No. 75-579

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY ESPÓSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 523 F. 2d 242.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1975, and a petition for rehearing was denied on September 16, 1975 (Pet. App. 31). The petition for a writ of certiorari was filed on October 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether information found in the prosecutor's files after trial was "newly discovered" for purposes of petitioner's new trial motion, where some of the information was known to petitioner prior to trial and the rest could have been obtained through the exercise of due diligence.

2. Whether a new trial was required because the prosecutor failed spontaneously to disclose to the defense the contents of a tape recorded interview in which the prosecution's principal witness admitted engaging in past criminal conduct, notwithstanding the court of appeals' finding that the additional impeaching information would have affected neither the jury's assessment of the witness's credibility nor its verdict of guilty.

3. Whether a new trial is required because of prosecutorial conduct that petitioner characterizes as improper but that the court of appeals found was not improper.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on both counts of an indictment charging him with the possession and subsequent distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). After an interim appeal,[1] petitioner was sentenced to

[1] The district court initially granted a motion for arrest of judgment on the ground that the prosecution had failed to prove the required "nexus" with interstate commerce. The court of appeals reversed and remanded for entry of judgment pursuant to the jury's verdict. *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, 414 U.S. 1135.

concurrent terms of two years' imprisonment and three years' special parole on each count. He thereafter moved for a new trial on the basis of newly discovered evidence, and the district court denied the motion (Pet. App. 24–28). The court of appeals affirmed (Pet. App. 1–23).

1. The evidence at trial is summarized accurately in the opinion of the court of appeals (Pet. App. 2–6). Petitioner agreed to sell cocaine to Charles Crimaldi, a government informant, and gave him a sample of the substance. Although the actual sale was never consummated, negotiations between the two men were conducted in person and over the telephone. Crimaldi wore a transmitting device during his two meetings with petitioner, and federal narcotics agents were able to monitor the conversations. An agent observed the second meeting and saw petitioner give Crimaldi a cigarette package containing the cocaine sample. Several telephone conversations between petitioner and Crimaldi were recorded with Crimaldi's consent, and the recordings were played for the jury.

Crimaldi acknowledged during his testimony that he had been convicted of armed robbery and burglary in 1950 and 1951 and that he had been a paid government informant for several years. Defense counsel asked Crimaldi on cross-examination whether he had "worked as a juice collector [*i.e.*, a loan-shark collector]" (Tr. 127).[2] Crimaldi replied, "I don't believe I have to answer that, do I?" (*ibid.*). Defense counsel stated, "No, you don't, not for me. That is all I

[2] "Tr." refers to the reporter's transcript of petitioner's trial. "H." refers to the transcript of the hearing on petitioner's motion for a new trial.

have" (*ibid.*). Counsel sought no ruling directing the witness to answer the question.

Crimaldi's criminal activity was again raised by defense counsel on cross-examination of Agent Haight. In order to place in context petitioner's charge that Agent Haight's testimony was untruthful, we set forth in a footnote the relevant portions of the pertinent colloquy.[3]

[3] The testimony to which petitioner points (Pet. 6) appears at Tr. 174–176:

"[DEFENSE COUNSEL]: Q. During the time that you were working with Crimaldi, other than the work that he was doing for you, did you know whether or not he was involved in any other illegal activities?

"A. No, sir, I do not.

* * * * *

"Q. You do not?

"A. I do not know if he was.

"Q. Well, when you first started to work with him in April or [*sic*] you certainly inquired into his background, didn't you?

"A. I was aware that he was a convicted felon.

"Q. You were aware that he was engaged in illegal activities other than the work he was doing for the Bureau, isn't that right?

"A. No, sir. * * * No, sir, not at the time I knew him.

"Q. I am not talking about that. I am talking about the time prior to the time that you knew him you were aware of his illegal activities, were you not?

"A. I was not aware of them.

"Q. No one told you he was in the juice business?

* * * * *

"A. I don't recall if I was ever advised of that or not, sir.

"Q. You knew it, though, didn't you?

"A. Personally? No, sir.

"Q. You didn't know that Crimaldi was in the juice business?

"A. I was unaware of it.

"Q. You didn't know too much about Crimaldi then, did you, when you first started to work with him?

"A. No, sir. As I say, I was first introduced to him in April of '71."

In closing argument, the prosecutor emphasized the evidence corroborating Crimaldi's testimony. He stated (Tr. 340–341):

> Whether or not you believe he was involved in juice collection or whether or not you believe he had some other criminal activity is not particularly important to this case. Perhaps if it were just Mr. Crimaldi alone it would be more important. But on every single point of this investigation when Mr. Crimaldi did something, it was confirmed either by a tape recorder, by a surveillance agent, or by the Kel set [transmitter]. He was never alone.

Defense counsel vigorously attacked Crimaldi's credibility, suggesting, despite the absence of evidentiary support, that the jury could reasonably infer that Crimaldi became an informant because he had been "caught selling heroin back in 1969."[4] The prosecutor responded on rebuttal that there was no evi-

[4] Defense counsel stated (Tr. 352–353):

"Now let's get back to Crimaldi and what kind of a person he is. I will tell you what paid informers—what happens to them. First of all, they generally get caught doing something. And in this case, probably selling heroin. I think that is a reasonable inference that you can draw from the evidence. Crimaldi isn't going to tell you that. Haight says he doesn't know about it.

"So I am entitled and I think you are too, the reasonable inference is that Crimaldi got caught selling heroin back in 1969 and they set him up as a pigeon. Do you know how they do that? The same way they tried to do it to Esposito. They make a deal. You know, give us some information and we will give you a pass. That is how Crimaldi becomes a partner of the Bureau of Narcotics. That is how these people spend your money and mine on rats like Crimaldi."

dentiary support for defense counsel's speculative assertion.[5]

2. In May 1971, about one month prior to the cocaine transaction involved in this case and after Crimaldi had agreed to become a government informant on organized crime matters, Crimaldi was interviewed in Washington, D.C., by Agents Braseth and Borner of the Bureau of Narcotics and Dangerous Drugs (H. 36, 45, 51, 94). The interview was tape recorded. In the course of the interview, described as "a running commentary as to who was in the heirarchy of the criminal syndicate at that time" (H. 20), Crimaldi discussed his involvement in a variety of criminal activities (H. 120–121), including "collecting for a juice loan racketeer" (Pet. App. 26).

The tape of the interview was turned over to representatives of the Chicago Strike Force (H. 46). Al-

[5] The prosecutor stated (Tr. 369–370):

"I asked you, please, not to consider what the lawyers say as evidence, and I want to show you what I mean. Because Mr. Cogan told you about the heroin and Mr. Cogan told you how informants usually work and generally they are caught for doing something and so that they won't get put in jail for doing that, they promise to work for the Government and help the Government. But there is absolutely no evidence that that is the case here. That is Mr. Cogan. That is not the evidence. And in fact, the evidence is to the contrary.

"This defendant has never—and he told you when he was in jail, and he told you what for, twenty years ago, armed robbery and burglary. Never narcotics. Agent Haight told you that he was not under charge now and that there was nothing pending against him now. So that whole theory about doing it to get out from under, worthless. It is worthless because it did not come from up there as testimony, but came from Mr. Cogan as surmise."

though Strike Force attorney Peter Vaira, who initiated the present prosecution, listened to a portion of the tape, he could recall no specific offenses admitted by Crimaldi on the portion of the tape he heard (H. 15, 20, 23). Vaira was transferred to Philadelphia prior to trial, and the case was reassigned to Assistant United States Attorney J. Michael Fitzsimmons. At a meeting with Fitzsimmons, Vaira, and Vaira's supervisor, Agent Braseth (who had interviewed Crimaldi) spoke of some of the matters that were discussed in the interview, including Crimaldi's past criminal activities (H. 71). There is no indication, however, that Braseth mentioned the existence of the tape or that Fitzsimmons was aware of its existence. Neither the tape nor the information on it was disclosed to defense counsel prior to trial.

After petitioner was convicted, Crimaldi testified in unrelated proceedings and made public statements concerning a variety of unprosecuted crimes that he had committed (see Pet. 5). Petitioner then filed a motion for a new trial on the basis of newly discovered evidence. On the day before the hearing on that motion, Fitzsimmons notified defense counsel that he had discovered the taped interview. The tape was subsequently transcribed at the district court's request, and the court examined the transcript *in camera* before ruling on the motion.

3. The district court denied the motion for a new trial (Pet. App. 25–28). The court found that the information on the tape "does not impeach [Crimaldi's] trial testimony" (*id.* at 26) and could have been

used only collaterally "in cross-examining Crimaldi about his reputation and criminal activities" (*ibid.*). In the absence of perjury, the court ruled, the prosecution was not required to disclose "this type of material" (*ibid.*). "Had the trial prosecutors known the contents of the tape, the better part of valor would have been to turn it over to the defense or let the court evaluate it *in camera*" (*id.* at 28). But, the court stated, "even if they were fully aware of the contents of the tape, we do not believe they have a non-discretionary duty to turn over to the defense all investigatory material in which a witness is involved, regardless of its relevancy and merely because it might aid in cross-examining this witness with respect to his prior criminal activities" (*ibid.*).

The court also found that petitioner "knew of [Crimaldi's juice loan] activity by reputation" but that—as "a matter of trial strategy which was knowingly and intentionally adopted"—"his attorney did not exhaust the inquiry [into that matter] at the time of trial" (*id.* at 26).

Moreover, since petitioner's "conviction was based upon eyewitness accounts of a controlled transaction, preceded by a tape-recorded telephone conversation and supported by on-the-scene photographs," the district court found it "difficult to believe that the outcome of the trial would have been different if the defendant had been given the tape in advance" and therefore had been "armed with additional impeaching evidence" (*id.* at 27). "We doubt if [Crimaldi's] admissions about himself would have been given much additional weight by the triers of fact, since he was known to be a convicted felon, a government informant and, by virtue of his refusal to answer questions, a possible juice collector" (*ibid.*).

Finally, the court rejected petitioner's assertion that Agent Haight committed perjury at trial. The court viewed Agent Haight's trial testimony concerning his knowledge of Crimaldi's prior criminal activity as "somewhat evasive and inconclusive" (*id.* at 28). At the hearing on the new trial motion, Haight corrected his trial testimony insofar as it may have suggested that he had been unaware of Crimaldi's criminal background during the time that Crimaldi was a government informant (see H. 110–118). The district court found (Pet. App. 28):

> We agree that Agent Haight has been impeached but not that he committed perjury. Furthermore, his testimony was not crucial to the defendant's guilt, and his credibility was not at stake. The government should not be penalized because of the carelessness of this witness.* * *

4. The court of appeals affirmed (Pet. App. 1–23). It ruled, first, that even if portions of the tape arguably should have been produced under the Jencks Act, 18 U.S.C. 3500, "it is perfectly clear that defendant was not prejudiced by the Government's failure to release these excerpts" (*id.* at 10).

Second, the court stated that "the Government has an obligation to reveal to the defense such evidence

in its possession as would be material to impeaching a prosecution witness" (*id.* at 11). But the court found it "unnecessary to make the materiality determination under *Brady* in this case because it is clear that, even assuming that the tape was 'material' in the *Brady* sense, government counsel's good faith failure to reveal it to the defense was harmless error" (*ibid.*).

The court rested that conclusion on the following considerations. (1) Crimaldi's convictions were put before the jury on direct examination, and the prosecution provided defense counsel prior to trial with Crimaldi's arrest and conviction record (*id.* at 13). (2) "The corroboration of Crimaldi's most material testimony is virtually complete," and "the establishment of Crimaldi's personal unreliability could mean little to the jury" (*id.* at 13–14).[6] (3) Crimaldi's "personal reliability was called into serious question anyway" by evidence of his prior convictions, his status as a paid informant who "received a bonus if his performance pleased the Bureau," his failure to answer the question whether he was a juice loan collector, and his association with organized crime (*id.* at 14). (4) Petitioner's counsel, as a matter of deliberate trial strategy, failed to pursue with Crimaldi the question whether he had been a juice loan collector (*id.* at 15).

[6] The court stated that "the jury's question about Agent Cruz' observation of the actual transfer of the cocaine indicates that its members were interested in the corroborative testimony about the transaction, rather than merely accepting Crimaldi's account at face value" (Pet. App. 14).

The court thus found that "the revelation of the tape and the defendant's use of that information therefrom which would have been made available to him by the district court after an *in camera* inspection would not have affected the jury's assessment of Crimaldi's credibility" (*ibid.*). The tape's "revelation would not have produced a reasonable doubt in the eyes of the jury" (*id.* at 15–16).

The court of appeals also sustained the district court's finding that Agent Haight did not commit perjury at trial and that his testimony was not crucial to petitioner's guilt (*id.* at 16–17). In addition, the court rejected petitioner's contention that the prosecutor's closing argument to the jury was at odds with the true facts concerning Crimaldi's past. The argument "was a proper response to the distortions in [petitioner's] trial counsel's closing argument" (*id.* at 17) and was not inconsistent with the contents of the taped interview or with the record (*id.* at 18).

ARGUMENT

1. Petitioner argues that he is entitled to a new trial because "the government's deliberate non-disclosure of material evidence" (Pet. 9)—namely, "the impeaching information contained in the tape and elsewhere" (Pet. 8; emphasis omitted)—deprived him of his Fifth Amendment right to due process and his Sixth Amendment right of confrontation. The contention fails at the threshold.

To prevail on his Rule 33 motion for a new trial on the basis of newly discovered evidence, petitioner was required to show not only that he discovered the evidence after trial but also that he could not, in the exercise of due diligence, have discovered it until then. See *United States ex rel. Regina* v. *LaVallee,* 504 F. 2d 580, 583–584 (C.A. 2), certiorari denied, 420 U.S. 947; *United States* v. *Slutsky,* 514 F. 2d 1222, 1225 (C.A. 2); 2 Wright, *Federal Practice and Procedure, Criminal,* § 557, p. 515 (1969 ed.). Petitioner did not discover the existence of the Crimaldi tape until after his trial. But, as he recognizes in his petition, "[i]t is the impeaching information contained in the tape and elsewhere—not the tape recording itself—which is significant" (Pet. 8; emphasis omitted). Much of that information was known to petitioner before trial. The rest of it, together with the existence of the tape, could have been discovered before trial if petitioner had diligently followed up on the information he had or at trial through proper cross-examination.

The courts below found that petitioner knew Crimaldi's reputuation as a murderer and a juice loan collector (Pet. App. 14–15, 26). He could reasonably have anticipated that the prosecutors would know something about Crimaldi's criminal background, and, if he believed that additional information of that sort would be helpful to his defense, he could easily have made a specific request to the prosecutors for information in their possession concerning the prior criminal activity of Crimaldi.

Such a request would have flagged for the prosecutors the potential importance of the information to the defense and might have led to disclosure before or during trial of the tape or the information contained on it. Petitioner's failure to make a specific request amounts to a failure to exercise reasonable diligence and should itself defeat his motion for a new trial. A contrary conclusion would permit a defendant to establish a claim of non-disclosure and obtain a second trial by failing fully to develop a pretrial lead and then "discovering" the same evidence in the prosecutor's file after trial.

2. Even if it be assumed that petitioner met his threshold burden, he would not be entitled to a new trial. As we argue in our brief in *United States* v. *Agurs,* No. 75–491, pp. 18–33,[7] a Rule 33 motion for a new trial on the basis of newly discovered evidence should not be granted, in the absence of culpable prosecutorial misconduct, unless the new evidence would probably lead to an acquittal. Since the additional impeaching information that petitioner allegedly "discovered" after trial plainly would not warrant a new trial under that standard, he argues that a different standard should be applied.

[7] We have sent a copy of our brief in *Agurs* to petitioner's counsel.

First, he contends (Pet. 10–11) that a new trial is required without regard to whether the additional evidence might affect the jury's verdict, because the alleged non-disclosure prevented him from conducting effective cross-examination of Crimaldi. But the case on which he relies—*Davis* v. *Alaska,* 415 U.S. 308—does not hold or imply that a new trial is automatically required, regardless of prejudice, where the defense discovers possibly impeaching information in the prosecutor's files after trial.

Davis involved a ruling by the trial court barring cross-examination by the defense concerning a prosecution witness' juvenile delinquency adjudication. There was no ruling in the present case limiting the scope of petitioner's cross-examination. Indeed, defense counsel asked Crimaldi whether he had been a juice loan enforcer and then voluntarily abandoned the line of inquiry when Crimaldi expressed reluctance to answer the question. Petitioner was not "denied the right of effective cross-examination" (*Davis* v. *Alaska, supra,* 415 U.S. at 318). He simply chose as a matter of trial strategy to end his cross-examination on what evidently seemed to him a favorable note.

Non-disclosure of impeaching information by a prosecutor may bear upon the nature of a defendant's cross-examination of a prosecution witness, but it has never been viewed as requiring a new trial irrespective of the likely effect on the jury's verdict. See *Giglio* v. *United States,* 405 U.S. 150, 154. The real question here is the standard by which the effect of the non-disclosure should be assessed.

Our views on that question are set forth in our brief in *Agurs,* pp. 20–33. We argue there that the only proper occasion for departing from the normal Rule 33 standard—*i.e.,* whether the new evidence is of such weight that it would probably lead to an acquittal—is when the prosecution has breached a *duty* of disclosure. Except when the evidence is so obviously exculpatory and so plainly central to the defense that the prosecutor's failure to volunteer it demonstrates active connivance in an unjustified conviction, the duty to disclose is activated only by a reasonably focused and specific defense request for information in the prosecutor's possession.

There was no such defense request here,[8] and it cannot fairly be said that the additional impeachment information concerning Crimaldi's prior criminal activity was either obviously exculpatory or central to the defense. In view of the nearly complete corroboration of Crimaldi's testimony, there was no reason to suppose that his prior criminal activity, which in any event would bear only collaterally on his credibility, would be critical evidence.

The district court thus concluded—correctly in our view—that even if the prosecutors had been fully aware of the contents of the Crimaldi tape, they would have had no "non-discretionary duty" to disclose that

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[8] A general request for all exculpatory evidence in the prosecutor's files is, in our view, equivalent to no request at all, because it cannot ordinarily be expected to accomplish the purposes that the request requirement is meant to serve. See our brief in *Agurs,* p. 29, n. 16.

information "merely because it might aid in cross-examining this witness with respect to his prior criminal activities" (Pet. App. 28). Cf. *Imbler* v. *Pachtman,* No. 74–5435, decided March 2, 1976, concurring opinion of Mr. Justice White, slip op. 14–15. This is particularly so in light of the fact that Crimaldi gave no false testimony, and the defense deliberately abandoned any effort to pursue the line of inquiry. In such circumstances, the prosecution was not obliged to insist that details not sought by the defense be brought out.

It follows, on our analysis, that petitioner is not entitled to a new trial, because it cannot reasonably be said that the additional impeaching information probably would lead to an acquittal. Underlying petitioner's contentions, however, is the contrary assumption that the prosecutors breached a clear duty spontaneously to disclose the information to the defense. Indulging that assumption *arguendo,* as did the court of appeals, there is nevertheless no basis for further review, because even under the relaxed standard applicable in such circumstances—*i.e.,* whether disclosure of the impeachment information "'could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" (*Giglio* v. *United States,* 405 U.S. 150, 154, quoting from *Napue* v. *Illinois,* 360 U.S. 264, 271)—a new trial would not be required here.

The court of appeals found, on the basis of a close examination of the record (see pp. 10–11, *supra*), that disclosure of the tape and the information contained on it "would not have affected the jury's assessment

of Crimaldi's credibility" and "would not have produced a reasonable doubt in the eyes of the jury" (Pet. App. 15–16). As we understand the court's opinion, that finding amounts to a determination that the additional information could not in any reasonable likelihood have affected the jury's verdict.

Petitioner does not appear to challenge the court's determination. He argues only that the court failed, in concluding that "any error was harmless" (Pet. App. 13), to specify that the error was harmless beyond a reasonable doubt. But it seems clear to us that the court of appeals' omission of the phrase "beyond a reasonable doubt" was inconsequential. The court's findings—fully supported by its analysis of the record—satisfied the substance of the reasonable doubt standard even if the language of that standard was not fully invoked.

3. Finally, petitioner argues (Pet. 15–16) that, regardless of whether his constitutional rights were violated by the nondisclosure of impeachment information, this Court should order a new trial in the exercise of its supervisory powers because the prosecution improperly argued to the jury that Crimaldi was a reformed youthful offender who was uninvolved in recent criminal activity and because Agent Haight testified falsely concerning his knowledge of Crimaldi's background. The court of appeals thoroughly considered and correctly rejected both contentions, and neither warrants further review.

As the court ruled, the prosecutor's closing argument "was a proper response to the distortions in

[petitioner's] trial counsel's closing argument" (Pet. App. 17), in which counsel made assertions that were not "supportable by the record" or "indeed by the transcript of the May 1971 tape of Crimaldi's * * * interview" (*id.* at 18). Contrary to petitioner's claim, the prosecutor's remarks were consistent with "[t]he taped interview and [the] record" (*ibid.*).

Moreover, the court of appeals sustained the district court's finding that Agent Haight did not commit perjury (Pet. App. 16–17). Indeed, while Haight testified at the hearing on the new trial motion that portions of his trial testimony (read to him out of context) may have been in error, the transcript of his trial testimony (set forth at note 3, *supra*) suggests that any misleading impression may be attributable more properly to the inartful and temporally confusing questions asked by defense counsel than to any deliberate falsehood by the witness.[9]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Although we do not believe that this Court's decision in *Agurs* will affect

[9] Even a close reading of the transcript fails to reveal precisely what defense counsel had in mind. His questions can reasonably be understood to ask (1) whether Haight knew that Crimaldi, *during the time he worked with Haight*, was also engaged in criminal activity, and (2) whether Haight knew or had been advised, *prior to the time he met Crimaldi*, that Crimaldi was in the "juice loan" business. A negative answer to those questions would not be inconsistent with Haight's having learned, *after* he met Crimaldi, that Crimaldi had engaged in criminal activity *prior* to the time he began to work with Haight.

the disposition of this petition,[10] portions of our argument here parallel our argument in *Agurs,* and the Court may accordingly wish to defer disposition of this petition pending the decision in *Agurs.*

Respectfully submitted.

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MARCH 1976.

[10] Even if the Court were to reject each of our arguments in *Agurs*, there would be no need to remand the present case for further consideration. In view of the court of appeals' findings here, the "newly discovered" evidence would not justify a new trial even under the reasonable doubt standard that petitioner says is applicable. In contrast, the court of appeals in *Agurs* found that the new evidence there was directly material to the defendant's guilt or innocence.

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